

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE

-----X **Docket#**
UNITED STATES OF AMERICA, : 13-cr-00607-JFB
:
- versus - : U.S. Courthouse
: Central Islip, New York
:
PHILLIP A. KENNER, et al., : July 8, 2020
Defendants : 2:38 PM
-----X

TRANSCRIPT OF CRIMINAL CAUSE
FOR TELEPHONE STATUS CONFERENCE
BEFORE THE HONORABLE VISITING JUDGE JOSEPH F. BIANCO

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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Proceedings

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1 THE CLERK: Calling 13-cr-607, United States of
2 America v. Phillip A. Kenner and Tommy C. Constantine.

3 Counsel, please state your appearances for the
4 record.

5 THE COURT: Actually, you know what? Hold on a
6 second. Why don't we do it this way, just so it's more
7 organized. I'll just call off who I think is on the
8 line, and just confirm that you're on the line.

9 Mr. Kenner, are you on the line?

10 DEFENDANT KENNER: Yes, sir.

11 THE COURT: Mr. Brissenden?

12 MR. BRISSENDEN: Good afternoon, your Honor.

13 THE COURT: Good afternoon.

14 Mr. Constantine?

15 DEFENDANT CONSTANTINE: Yes, your Honor, I'm
16 here.

17 THE COURT: Mr. Talkin?

18 MR. TALKIN: Yes, good afternoon, your Honor.

19 THE COURT: Good afternoon.

20 And then for the government, we have Ms.
21 Leonardo-Beckmann, Mr. Haggans, Ms. O'Connor, and
22 Ms. Komatiredy?

23 UNIDENTIFIED SPEAKER: We are all on, your

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1 Honor.

2 Good afternoon.

3 THE COURT: Good afternoon. And Mr. McSouther,
4 and Mr. Mulry?

5 MR. SOUTHER: Yes, good afternoon --

6 MR. MULRY: Good afternoon, your Honor. Mr.
7 Souther is on the line.

8 THE COURT: Good afternoon, to both of you.

9 Mr. Kostolampros, Ms. Weiner, and Ms. Strohbehn
10 for the bank?

11 MR. KOSTOLAMPROS: Yes, your Honor. Yes, your
12 Honor, we are on the line. Good afternoon.

13 THE COURT: All right, good afternoon.

14 Mr. Wolinsky, are you on the line?

15 MR. WOLINSKY: Yes, I am. Good afternoon, your
16 Honor.

17 THE COURT: Good afternoon.

18 And I don't know if Ms. Ramachandran is on the
19 line.

20 MS. RAMACHANDRAN: I am, your Honor.

21 THE COURT: Oh, great.

22 MS. RAMACHANDRAN: Good afternoon.

23 THE COURT: Good afternoon. All right.

24 So I've got a number of things I wanted to go
25 through today. I'm going to start with the forfeiture

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1 issues because some people may not want to continue to be
2 on the call once we get through those issues.

3 So I did obviously receive the various
4 submissions related to the discovery with respect to the
5 government, and the bank regarding the forfeiture issues,
6 forfeiture motion. I did -- this is what I -- I'm going
7 to tell you what my general approach is going to be and
8 then obviously, I'll let each side have an opportunity to
9 be heard because I have reviewed all the submissions.

10 The bottom line is that I do think that the
11 government's requests are overbroad, burdensome, and
12 potentially irrelevant in many respects but I'm also not
13 able to determine -- obviously, there's a lot of
14 documents, there's a lot of issues, I cannot determine
15 that nothing that the government asked for would be
16 warranted for purposes of the discovery, and as
17 indicated, they have a forensic accountant who they're
18 working with who is obviously guiding them in terms of
19 what he or she believes or some of the additional
20 documents that the government would need in connection
21 with the summary judgment motion by the bank.

22 So this is the way I think we should proceed to
23 obviously do this in the most expeditious manner, and
24 given my concern that a lot of what the government asks
25 for may be unnecessary.

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1 I'm going to try to resolve a couple of things
2 that I see, just based upon the back and forth in the
3 letters, but the general -- what I'm going to direct the
4 government do is to respond to the summary judgment
5 motion on the merits, and to the extent -- I would just
6 note obviously by the fact that the government put in
7 this single-spaced multi-page letter on these various
8 issues, with a lot of arguments in there, it seems to me
9 to prove to some extent, that the government, based upon
10 the documentation that I've gotten so far is able to make
11 some of the arguments that it wishes to make in
12 connection with the bank's motions, and the requirements
13 that the bank must (indiscernible), but in any event, to
14 the extent that the government believes that they are
15 entitled to additional documents in order to properly
16 respond to the motion, then this is akin to a summary
17 judgment -- you know, the rules for summary judgment --
18 you know, the rules for summary judgment under the civil
19 procedure rules, the government could put in a
20 declaration under 56(d) from the forensic accountant or
21 from someone, you know, it doesn't matter who necessarily
22 it's from, but it has to be detailed with respect to why,
23 you know, a particular document or category of documents
24 is material to their ability to respond to the bank's
25 motion.

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1 But the government should assume, based upon
2 the -- it should -- I don't want the -- that's not going
3 to be the government's only response to the motion. The
4 government should respond on the merits based upon all
5 the documentation that they've gotten so far with the
6 assumption that they're not going to get any additional
7 discovery, but to make a request for additional discovery
8 in that format.

9 You know, having saving that, Mr. Kostolampros,
10 I just want to highlight, and I'm going to go through
11 this with you briefly in a moment, but the bank -- to the
12 extent that the bank, you know, is not voluntarily
13 producing certain things that the government has asked
14 for, and I know, obviously -- I'm not suggesting you
15 produce everything that they're asking for but the bank
16 is running the risk that once I get the government's
17 motion, if they do put in on those 56(d) declarations,
18 that if I believe they are entitled to additional
19 documentation, the bank runs the risk of slowing this
20 down because then I'm going to direct that you provide
21 those documents, and then the government may be able to
22 supplement through opposition, and that's just going to
23 slow things down, which I know is not what you want.

24 So I'm going to suggest to you, and I'm going
25 to just give you a few examples in a moment, that to the

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1 extent that there are narrow requests that the government
2 is making, that the bank can produce easily, even if you
3 believe -- a lot of these, I know in your letters to me
4 you argue that it's irrelevant as a matter of law, it's
5 not going to matter, it's not the standard, I would
6 suggest to you that -- again, assuming that it's not
7 something very broad, that it would cost a lot of time
8 and money for the bank to produce, that even if you
9 believe that it's not relevant, or going to be relevant,
10 and I know you understand this because you produced a lot
11 of documents already, I would suggest that you just
12 produce it to avoid this potential delay down the line.
13 Right? Do you understand what I'm saying Mr.
14 Kostolampros?

15 MR. KOSTOLAMPROS: I do, your Honor, and you
16 should know, look, we made the offer to the government
17 months ago when we learned that they did have an expert,
18 is look our people are available to speak to their
19 experts, if they have any questions about any particular
20 transfers, any particular issue, and we're happy to walk
21 them through that -- those issues, and give them any
22 supporting documents. So that offer remains standing.

23 THE COURT: Okay. Well, I would suggest the
24 government take you up on that offer, but I'm just going
25 to give you an example. For example, on page 9 of the

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1 government's response, on the July 3rd letter, they give
2 a list -- and again, I assume this is from the
3 accountant, of certain things that they would the
4 documentation.

5 And now it appears to me based upon reaching
6 the chart and your letter from June, that you are going
7 to give them some -- all of these Trimont (ph.) records
8 that they're seeking. So maybe you already are going to
9 do some of these things, but that would be an example --
10 it seems like most of the things on that list would not
11 be, other than potentially the last thing, would not be
12 something that would be like thousands and thousands of
13 pages of documents.

14 So to the extent that they're accountant seeks
15 things, and I would charge the government either orally
16 with the government, or in a format similar to page 9, to
17 more narrowly identify specific things that the
18 accountant is concerned about, or believes that there's
19 some gap in the documentation because those are the ones
20 that I think are most likely, potentially create a
21 problem for the bank in a motion, if it turns out to be
22 something that's material.

23 And then on this broader issue with respect to
24 the government requesting very broad categories of
25 documents with respect to whether or not the bank had

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1 notice that the property was subject to forfeiture, I'll
2 just state two things on that.

3 The first is, you know, I think the
4 government's argument with respect to that is fairly
5 weak, and the government could prepare its motion and Mr.
6 Kostolampros can tell me if I'm wrong on this, but the
7 government has this chart of all the publicly available
8 information that was out there about issues related to
9 the civil litigation, or other issues related to the
10 property that I think Mr. Kostolampros' argument is that,
11 assuming the bank was aware of every single one of those
12 things, it would be not be sufficient to put them on
13 notice that this property was going to be subject to
14 criminal forfeiture at that point in time.

15 So to that extent, that's -- there wouldn't
16 need to be any discovery on who knew which one of those
17 things on that chart because I think the bank's prepared
18 to take the position that even if the bank knew
19 everything on that chart, that it's not enough. Is that
20 accurate, Mr. Kostolampros?

21 MR. KOSTOLAMPROS: That is accurate, your
22 Honor.

23 THE COURT: So the government should brief it
24 that way. It should brief that assuming the bank knew
25 every single one of the publicly available things, you

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1 know, to the extent the government is saying well, wait a
2 second, we want to -- beyond the publicly available
3 things, we want to go through every email the bank has,
4 about what they might've been known to them independent
5 of that, that I believe is a fishing expedition. I'm not
6 going to tell the bank to produce -- you know, to go
7 through every document that could've ever existed
8 regarding anything that they were aware of publicly or
9 otherwise because there's no basis, mind you, to believe
10 that.

11 But again, this is another example, Mr.
12 Kostolampros -- there is a reference, I forget the
13 individual's name, the Fortune -- there's a Fortune
14 Magazine article?

15 MR. KOSTOLAMPROS: Yes, Mr. Hughes (ph.).

16 THE COURT: Right, so if -- and you know, I was
17 never a corporate lawyer, so maybe I don't understand
18 exactly what documents would be in this category but I
19 would assume that there's a pretty narrow category of due
20 diligence, reports, or documents that would exist for
21 2009 to 2014 time frame, at the time of the additional
22 loans, that could be made reference to, essentially our
23 due diligences would've picked up if there are any
24 problems. So that would be, to me, something that the
25 bank, unless I'm missing something, should just produce

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1 to the government. If in fact, there was due diligence
2 done during that period that didn't reveal anything, you
3 know, in terms of something the bank -- would be a red
4 flag to the bank, I don't understand why the bank
5 wouldn't -- you know, I'm not asking you to search every
6 email in the bank's system, but I assume in a corporate
7 setting like that, there's going to be summary reports
8 that were generated regarding to whatever investigation
9 was done with respect to the resort before the additional
10 monies were lent, or am I missing something?

11 MR. KOSTOLAMPROS: Yeah, your Honor, because
12 there's going to be emails that would be sort of
13 (indiscernible) in the due diligence category of when the
14 loan was acquired, and then afterward.

15 You know, like to separate sort of a due
16 diligence file, like let's say they have -- I'm
17 forgetting -- I'm blanking on what these are called,
18 these diligent rooms, right, you know, frankly I'm not --
19 I'll have to go back and look and see if there was a
20 diligence room that applied here, but you know, going
21 forward, I mean, the issue is where do you draw the line?
22 I mean, there are going to be emails going back to 2008,
23 2009, and throughout the time period, but where do you
24 draw the line on what is diligence, and what isn't.

25 Frankly, all of that is part of the diligence,

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1 I would think, and in initially acquiring the loan, and
2 then later, you know, the various modifications.

3 THE COURT: Well, maybe -- again, I would
4 assume that it wouldn't just be in the form of email,
5 that there's be some summary report that put together in
6 one document or, you know, this is everything that we've
7 learned from our investigation of the resort, that you
8 wouldn't have to search individual email accounts for
9 something like that, but if I'm wrong about that, then I
10 stand corrected on that.

11 I just assumed that --

12 MR. KOSTOLAMPROS: Well, what we --

13 THE COURT: -- there would be a summary
14 document that would try to compile -- that's what I --
15 that's where I draw the line is that if there's a summary
16 document that the bank utilized in making the final
17 decision, that's the type of thing that the government --
18 the bank should just produce.

19 Again, I'm not suggesting that necessarily
20 anything that was in there would necessarily meet the
21 standard under the law but I don't want to have a
22 situation where the government in opposition is saying,
23 you know, we didn't get any window into that at all. Do
24 you understand?

25 MR. KOSTOLAMPROS: Okay. All right, I

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1 understand. I understand. Let me go back and check and
2 see if there are, but my understanding is there isn't
3 anything that's a summary document.

4 THE COURT: Okay.

5 MR. KOSTOLAMPROS: But one other thing I wanted
6 to raise, your Honor, before you move on, and you did
7 talk about page 9 in the listing there. One of the
8 issues there is, you know, they've asked for Trimont
9 records -- in particular two things, Trimont summary
10 reports, and invoices, and we provided everything that we
11 have in our records today.

12 To the extent something is missing, we just
13 haven't been able to locate it. Remember, this goes back
14 to 2009, and we've provided everything that we've gotten
15 -- that we have to them.

16 They've also questioned picking \$3 million in
17 advances. Now they acknowledge that we provide wire
18 transfer information showing wire transfers from the bank
19 to Trimont, the third-party servicer, and now what
20 they're asking for is wire information from Trimont to
21 the borrower.

22 Now we don't have that but we do have Trimont
23 records that say look, this is how much the borrower now
24 owes. So I don't know why we need to provide anything
25 else. I mean, we've shown that we sent the money to --

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1 that Danske sent the money to Trimont, and Trimont then
2 listed it out to the borrower, \$53 million worth of
3 advances.

4 THE COURT: Look again, I'm not going to go
5 through each one of these things.

6 MR. KOSTOLAMPROS: Right.

7 THE COURT: You know, you're entitled to make
8 the motion, and your argument is we've provided them
9 enough documents already for them to adequately respond
10 to this. All I'm suggesting to you is I'm not denying
11 the motion for any additional discovery, I'm just going
12 to tell them they should make it part of their opposition
13 in the form of Rule 56(d) but I'm also telling you that
14 you should try to do your best at this juncture in the
15 next week or so, to the extent it's practical, and you
16 don't think -- you believe it's, you know, a total fixing
17 expedition to try to provide them with whatever narrow
18 additional categories of documents you haven't already
19 provided them with, all right?

20 MR. KOSTOLAMPROS: Yep, yep.

21 THE COURT: All right. I don't know if the
22 government -- does the government have anything they want
23 to add on that?

24 UNIDENTIFIED SPEAKER: Your Honor, the only
25 thing the government would like to address is that in

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1 light of your Honor's instruction that in responding to
2 the bank's motion to summary judgment, the government
3 should assume it won't receive additional discovery. The
4 government would respectfully request permission to
5 cross-move for summary judgment.

6 THE COURT: That's fine. You could do that as
7 well, but it's going to be at the same time. You could
8 file your opposition, and cross-move simultaneously,
9 okay?

10 UNIDENTIFIED SPEAKER: Yes, your Honor. Thank
11 you.

12 THE COURT: All right. So I'm just going to
13 give you, and especially in light of that, I was going to
14 extend -- I think -- I forgot what date I gave you
15 initially, but the documents that you said you were going
16 to provide in a week or so, I think it was in your June
17 22nd letter, have those documents been provided to the
18 government, or are you still getting those together?

19 MR. KOSTOLAMPROS: Your Honor, we provided
20 everything but two items, which we plan on getting to
21 them by the end of this week.

22 THE COURT: Okay.

23 MR. KOSTOLAMPROS: One is whatever English
24 translations of the trust agreement that we have, that we
25 haven't already produced, and then information related to

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1 a transfer of October 24th, 2018, I believe, and we'll
2 provide that to them by the end of this week.

3 THE COURT: All right.

4 MR. KOSTOLAMPROS: But everything else has been
5 given to the government.

6 THE COURT: All right. And again, I'm
7 assuming, I'm hoping and maybe I'll be pleasantly
8 surprised that both sides will try to -- you know, again,
9 especially if the accountant wants to speak directly to
10 counsel regarding some of the things that are still
11 outstanding, I would -- you know, rather than wait for
12 that declaration, essentially the government should
13 highlight what would be in that declaration, not with
14 those broad categories that are in the chart, but more
15 narrowly targeted requests than the ones that are on page
16 9. I'd suggest that take place over the next week or so.

17 But I'll give the government 45 days from today
18 which -- what's that, August 23rd?

19 UNIDENTIFIED SPEAKER: Your Honor, I believe
20 that's Sunday.

21 THE COURT: So that's the 24th?

22 UNIDENTIFIED SPEAKER: Yes, your Honor, thanks.

23 THE COURT: And then so Mr. Kostolampros, it
24 would be I guess your reply, and your opposition to their
25 cross-motion, so how much time do you want for that?

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1 MR. KOSTOLAMPROS: Your Honor --

2 THE COURT: I know it's hard to say without
3 having it.

4 MR. KOSTOLAMPROS: Right.

5 THE COURT: But, you know --

6 MR. KOSTOLAMPROS: And frankly, we're --

7 THE COURT: You could always ask for more time
8 if you need it.

9 MR. KOSTOLAMPROS: Yeah, look, I mean first of
10 all, I'd would just like to sort of address giving the
11 government 45 days from today, I mean look, they've had a
12 summary judgment motion, and I think we should stick with
13 the same calendar 45 days from the date that we filed it.
14 I mean, there's nothing new here.

15 The government has already raised its
16 arguments, and I think pushing this back just keeps
17 constantly pressing up to, you know, the issues that
18 we're facing. I mean the resort still faces a lot of
19 uncertainty. As we understand it, the resort has enough
20 cash to get it through the end of August, and is trying
21 to get to stretch that amount, but I think that pushing
22 this off -- and there's really no basis to push it off
23 because the Court -- the government has already raised
24 its arguments. I think we all know what they're going to
25 argue.

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1 THE COURT: What was the -- I don't remember,
2 what was the date that I initially set?

3 MR. KOSTOLAMPROS: It was 45 days after the --
4 Danske filed its summary judgment motion.

5 UNIDENTIFIED SPEAKER: Your Honor, the date
6 originally was August 10th, so it's a mere two weeks
7 more.

8 THE COURT: Yeah, I mean I'll make it August
9 17th. I'll split the difference, okay --

10 MR. KOSTOLAMPROS: Okay.

11 THE COURT: -- with the government. So August
12 17th, when you can put in your opposition to their motion
13 and your reply.

14 MR. KOSTOLAMPROS: I would say I'd give us 30
15 days for that.

16 THE COURT: All right.

17 MR. KOSTOLAMPROS: And we needed more time,
18 we'll go back to your Honor -- come back to your Honor.

19 THE COURT: Yep, yep. So September 17th. And
20 then I'll give the government till September 30th for the
21 reply on your cross-motion. And then I'm not going to
22 set it now but I'm going to tell you what's going to
23 happen. We'll have -- I guess I'll consider it an oral
24 argument in early October, you know, I would say within a
25 week or so of the 30th, but I'll ask any questions that I

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1 have based upon the submissions, and you know, my plan
2 would be to rule shortly thereafter.

3 All right? I know -- now Mr. and Mrs. Nolan, I
4 saw put in their claim, so how does the government want
5 to handle that?

6 UNIDENTIFIED SPEAKER: Your Honor, we haven't
7 even looked at it. I believe it's filed today. So we'll
8 have --

9 THE COURT: All right. So if you want to look
10 at it, and then obviously have a discussion with counsel
11 regarding how you want to proceed with respect to that
12 because I want to try to keep these on the same track to
13 the extent possible, so Ms. Ramachandran, do you have any
14 proposal with respect to that? Do you want to speak to
15 the government and put in a letter?

16 MS. RAMACHANDRAN: I'll speak to the government
17 after this call and put in a letter.

18 THE COURT: All right. I did want to note that
19 for Mr. Kenner through Mr. Brissenden had made a renewed
20 request for this, and I think I mentioned in the last
21 conference about whether or not there was any type of
22 settlement agreement that was reached where there might
23 be an offset, and the government did put in a letter
24 addressing your letter, but the government basically says
25 in that letter, we don't know anything about a

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1 settlement, and basically to ask you about it.

2 So again, I'm just requesting that at some
3 point you'll have to advise the Court, not just for
4 purpose -- obviously, I'm ruling to restitution, on the
5 issue of restitution, whether or not Mr. Kenner --
6 whether it should be an offset based upon a settlement
7 that was reached, okay?

8 MS. RAMACHANDRAN: So I don't -- yes, your
9 Honor, just to tell your Honor where we are on that issue
10 now, I can certainly put this in writing, I'm not aware
11 of any settlement agreement. There is an assignment
12 agreement which we appended to our petition which shows
13 Mr. Nolan's interest in the Diamante properties. That's
14 not a settlement agreement.

15 I don't think that any -- even if there were a
16 settlement agreement, or even any other type of repayment
17 from an insurer or something like that, my understanding
18 of the law is that that is not an offset to restitution
19 that the defendant pays, it could potentially be an
20 offset to restitution owed to a victim, but it shouldn't
21 affect Mr. Kenner's restitution.

22 THE COURT: Well --

23 MR. RAMACHANDRAN: And I don't think it affects
24 Mr. Nolan's restitution here.

25 THE COURT: Okay. Well, we could address that.

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1 You know, I'm not suggesting you're necessarily going to
2 have to disclose it. We'd have to figure out whether or
3 not it would be the base of an offset, and first we would
4 have to figure out whether it exists or not.

5 So but Mr. Kenner, I don't know if you saw what
6 she's referring to, you're not referring to an
7 assignment, you think it is an actual settlement?

8 DEFENDANT KENNER: Well, it's part and parcel
9 to the settlement agreement that the (indiscernible)
10 acknowledge in the 2017 agreement, I think (audio
11 interference) is that there was a previous settlement,
12 assignment, however you want to parse the words,
13 agreement with Nolan, Gino (ph.) and Moreau (ph.) back in
14 2009.

15 THE COURT: Okay, so --

16 DEFENDANT KENNER: So (indiscernible) the
17 agreement wasn't out of the goodness of Mr. Jowdy's
18 heart, it was an assignment agreement as part of a
19 settlement negotiation with them when they all decided to
20 work together with Jowdy (indiscernible) Investment
21 Group.

22 THE COURT: All right, so I think Ms.
23 Ramachandran, it does sound like that's what he's
24 referring to, so if your belief is that any such
25 assignemtn would not legally be the basis for any type of

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1 offset for Mr. Kenner's restitution, then you should
2 probably put in a letter on that --

3 MS. RAMACHANDRAN: Okay.

4 THE COURT: -- so I could determine whether or
5 not there needs to be a further disclosure.

6 MS. RAMACHANDRAN: Okay, and I want to go back
7 and check, and make sure I'm right about the fact that no
8 settlement agreement exists. I don't think there is one,
9 so --

10 THE COURT: All right, but his point is that
11 whether you call it a settlement or an assignment, that
12 essentially that was functioning -- some type of
13 settlement, that I don't -- I didn't focus on that but
14 that's what it is -- that's what he is suggesting.

15 DEFENDANT KENNER: Your Honor, this is Mr.
16 Kenner.

17 What I'm aware of is, and this came out during
18 the arbitration, the pendency of the '09 arbitration was
19 that the Nolan party had settled with Mr. Jowdy's parties
20 for any and all related matters for funds that Jowdy that
21 had received, directly or indirectly, and as a result, he
22 was transferred or assigned, or settled on a one percent
23 equity stake in the Cabo San Lucas project, which at the
24 time of settlement had a net-net value of about \$3.25
25 million based on third-party appraisals, and third-party

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1 lending at the time.

2 THE COURT: All right. So Ms. Ramachandran, if
3 you should just maybe two weeks from today, just put in a
4 letter to me, just tell me what your position is with
5 respect to that, okay?

6 MS. RAMACHANDRAN: Okay, okay, will do.

7 THE COURT: All right, are there any other --
8 anyone want to raise any other issues with respect to
9 forfeiture because I was then going to move onto some
10 sentencing issues.

11 MR. KOSTOLAMPROS: Your Honor, this is Mr.
12 Kostolampros again.

13 I'd just like to raise one point. The
14 government in its letter again says that Danske abandoned
15 settlement discussions. We have not. We haven't heard
16 from the government, and our last offer remains
17 outstanding. So I just wanted to set the record straight
18 of that. We just simply haven't heard from the
19 government -- the government at all.

20 THE COURT: All right. I don't -- again,
21 there's nobody more in favor of the parties trying to
22 resolve this for everyone's sake, but is there a reason
23 the government has not responded to that offer? Why is
24 the government not engaged in any dialogue at this point
25 on that?

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1 UNIDENTIFIED SPEAKER: Your Honor, as the
2 government mentioned in its letter, the biggest bar to a
3 settlement was the bank's refusal to provide the proof of
4 its claim, and the government's not in a position to
5 settle with the bank without seeing adequate proof of the
6 claims.

7 THE COURT: All right. Mr. Kostolampros,
8 you've got to work with them to the extent you can, okay?
9 I'm not a magician. All right?

10 MR. KOSTOLAMPROS: And neither are we, so --

11 THE COURT: All right.

12 MR. KOSTOLAMPROS: -- I think we're at
13 (indiscernible) there, so --

14 THE COURT: All right.

15 MR. KOSTOLAMPROS: Thank you, your Honor.

16 THE COURT: All right, so I just want to move
17 to sentencing, and I just want to discuss the ability to
18 go forward as it relates to Mr. Kenner, and being in
19 court for sentencing as I preferred.

20 So Mr. Kenner, I did speak to the marshals, and
21 there has not been any defendant that they were aware of,
22 who has been transported from the jail to report in-
23 person court appearance as of yet. The only people that
24 have been (indiscernible) under arrest, or already being
25 in the building being processed and went into a

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1 courtroom, and then were brought to the jail following
2 their arrest.

3 But the bottom line is I told them that I want
4 to try to get this done soon, and they said that they
5 would be able to transport you. It's not going to be
6 able to happen on the date I set. We're going to give a
7 little bit more time to deal with the logistics of that.

8 The one thing I wanted you to be aware of and
9 maybe you know this already, but the protocol right now,
10 and I don't know that this is going to change anytime in
11 the near future, is that anybody -- any inmate coming to
12 the jail from the outside when they return, will go into,
13 you know, I guess it's a single cell for 14 days,
14 isolation, to make sure that they're not bringing the
15 virus into the jail. So I didn't want you to be
16 surprised by that, or be upset about that, but that's
17 what would happen following the sentencing. You'd be
18 brought to some unit in the jail where they would be put
19 you in a single cell.

20 So unless you tell me you don't want that, my
21 plan would be -- I'm not going to set the date today,
22 because I have to try to figure out, you know, the
23 marshal's and the Court, what a good day to be in August
24 for you to do that, but -- consistent with everybody's
25 schedule, but I just wanted to get the okay from you

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1 before arranging that.

2 DEFENDANT KENNER: Your Honor, I am frankly,
3 based on the conditions report that I had forwarded
4 along, I'm really not interested in a 14-day quarantine
5 after the return from Court, so if your Honor would just
6 consider that with respect to what you're trying to
7 accomplish, I would appreciate that.

8 THE COURT: All right. Well --

9 MR. TALKIN: And, your Honor, this is Sam
10 Talkin.

11 There's another little wrinkle to that. You
12 know, Mr. Constantine lives in Arizona, and I believe
13 he's required to quarantine himself right now if he comes
14 here from there.

15 THE COURT: Right, yeah, I thought about that.
16 My plan was to de-couple their sentencings.

17 MR. TALKIN: Oh, okay, got it. Thanks. I
18 didn't know that.

19 THE COURT: Yeah. You know, I was trying to do
20 them one after the other, but if Mr. Kenner wanted to go
21 forward, then my plan was to put Mr. Constantine's off,
22 but -- well, Mr. Kenner, the only -- I understand that,
23 and the issue with respect to that is, and I'm trying to,
24 you know, look into the future a little bit, I don't see
25 that policy changing anytime soon. I would assume that's

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1 going to be the policy for a long time, until the virus
2 subsides in some way. So that creates a bigger problem.

3 If you're telling me I don't want to come to
4 the courtroom if I'm going to have to quarantine for 14
5 days, I mean, we could be talking months, and months, and
6 months then. So I have to think about that because my
7 only other option would be to do the video sentencing,
8 which as I told you previously, I'm not -- you know, I
9 would like to avoid.

10 I don't think -- what's your concern about the
11 -- just because you would be in a different area? I
12 don't understand exactly what your concern is about --
13 I'm going to have to look into what the conditions of
14 confinement would be upon your return but --

15 DEFENDANT KENNER: Yeah, I'm familiar with what
16 they'll be, and you know, relative to what the measures
17 that are already being implemented on it (indiscernible)
18 basis, I would just prefer not to have that.

19 THE COURT: All right. Also, I just wanted the
20 government to be aware, Mr. Kenner did send me an ex-
21 parte letter about the jail, and his situation at the
22 jail in terms of his conditions of confinement. He asked
23 me not to file it publicly or to share the details of it,
24 so -- but Mr. Kenner, you know, because we've confronted
25 this issue in the past, if that's your position and it's

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1 hard for me to address anything that you have in letter
2 because it's not something I can do without sharing with
3 the government, have them a chance to respond to what
4 you're concerned about, so you understand that, right?

5 DEFENDANT KENNER: Well, your Honor, why don't
6 you go ahead and just release it to them then.

7 THE COURT: Okay. All right.

8 DEFENDANT KENNER: More (indiscernible) --

9 THE COURT: Let me just say, I will release it
10 but just let me ask you generally that, I mean, do you
11 have any medical issue that you want me to have them --
12 you know, I'll make sure that you get additional medical
13 attention if there's some ongoing issue.

14 DEFENDANT KENNER: No, no, I'm okay.

15 THE COURT: All right. All right. So I will
16 unseal that letter, and the government will get a chance
17 to respond to it. Does the government want to weigh in
18 on the issue regarding the sentencing, and the form of
19 the sentencing?

20 MS. KOMATIREDDY: Your Honor, this is AUSA
21 Komatireddy.

22 I would only note that the (audio interference)
23 to be in touch of the victims, and they do prefer an in-
24 person sentence. I just wanted you to be aware of that.
25 I know that's not (audio interference).

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1 THE COURT: Yeah, my plan was to do it in the
2 ceremonial courtroom, which would leave a lot of space
3 for victims or anyone else who wanted to be in-person, in
4 addition to obviously, Mr. Kenner, and Mr. Brissenden,
5 but, you know, I'm going to have to -- I didn't get into
6 the details of what would happen when Mr. Kenner
7 returned. I'm going to look into that a little bit more.

8 Again, my instincts are that that is not going
9 to change in the near future, but let me look into that a
10 little bit more. Again, I'm not going to set a date for
11 today, but I'll either deal with that through some type
12 of order, or we'll have another conference call to
13 discuss it further, but in terms of Mr. Talkin, in terms
14 of your client, obviously I know the situation in
15 Arizona, and because he's out on bail --

16 MR. TALKIN: Right.

17 THE COURT: -- that situation is a little bit
18 different.

19 MR. TALKIN: Yeah, we'll work with the Court
20 and the government, and figure out to how to do this with
21 him.

22 THE COURT: All right.

23 MR. TALKIN: It's a lot easier.

24 THE COURT: And if I do de-couple them, you
25 know, he can still listen in on the phone, and to what

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1 the victims are saying, so that if they don't want to
2 come --

3 MR. TALKIN: They'll --

4 THE COURT: -- to sentencing too, he'll have
5 heard what they said, and can respond to it at his
6 sentencing.

7 MR. TALKIN: Correct. And I'll probably --
8 I'll make a live appearance, and I'll have him appear by
9 phone, if that's the best way to do it.

10 THE COURT: Okay. All right.

11 Then the two other issues -- and Mr. Kenner,
12 you did put in a stay for the forfeiture proceeding. The
13 government responded. I did want to give you a chance to
14 reply. I didn't see it come up on the docket. I don't
15 know, did you plan on putting something in in writing on
16 that?

17 DEFENDANT KENNER: Yes, I would, as soon as I
18 get the reply from the government.

19 THE COURT: I'm sorry, say that again.

20 DEFENDANT KENNER: As soon as I receive the
21 reply from the government, I will expeditiously prepare
22 one.

23 THE COURT: Oh, you didn't -- Mr. Brissenden,
24 did you see that on ECF?

25 MR. BRISSENDEN: I did, your Honor. I

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1 forwarded a copy to Mr. Kenner. I don't know if --

2 THE COURT: All right.

3 MR. BRISSENDEN: -- you know, it's obviously
4 difficult to get anything through to the MDC.

5 THE COURT: All right. If you could just
6 coordinate with Mr. Kenner to make sure he gets that, and
7 I'll wait for your reply to come in before I rule on
8 that, Mr. Kenner.

9 And then on the -- I would -- someone doesn't
10 have their phone on mute --

11 UNIDENTIFIED SPEAKER: (Indiscernible).

12 THE COURT: The only other issue I had was the
13 Brady motion that -- the supplemental motion Mr. Talkin
14 filed with the government. Can the government put in a
15 written response to that?

16 MS. KOMATIREDDY: We have not yet put in a
17 response, your Honor, (audio interference). I just want
18 to see if there's any further guidance from the Court on
19 (audio interference).

20 THE COURT: Yeah, I mean, I just -- again, the
21 government -- they now have this report from this expert
22 suggesting that this forensic report suggests that what
23 they're saying is correct, that there was a failure for
24 him to get certain documents. I know the government has
25 other arguments, but I do want the government to just

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1 respond to that, whatever they agree that that does
2 demonstrate that, or they think there's something faulty
3 about that report. Okay?

4 MS. KOMATIREDDY: Yes, your Honor.

5 THE COURT: All right. Given that someone
6 doesn't realize they don't have their phone on mute, I
7 think we should finish up the call.

8 Is there anything else that needs to be
9 addressed today? I had one other thing, there are these
10 affidavits of loss that came in. I just want to make
11 sure that Mr. Kenner and Mr. Talking are getting those
12 affidavits so that they can respond to them.

13 And also, I know the government put in a
14 revised restitution chart for the Court, but I don't know
15 whether -- I'm (indiscernible) those affidavits to see
16 whether or not they alter what the government submitted.
17 Are they consistent with the prior chart or Ms.
18 Komatireddy, does the government need to incorporate
19 those?

20 MS. KOMATIREDDY: Your Honor, what we did --
21 and I'm glad that we're taking a moment to discuss this,
22 is we provided the Court with the numbers of loss in
23 connection with the trial. Now there's --

24 THE COURT: Okay.

25 MS. KOMATIREDDY: -- (audio interference)

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1 victims have submitted various affidavits that have to do
2 either with victims who did not testify at trial, but has
3 claimed in relation to the three objects that were proven
4 at trial, or alternatively, victims that did testify at
5 trial but have claims related to other objects or other
6 instances of fraud --

7 THE COURT: Right.

8 MS. KOMATIREDDY: -- in relation to Mr. Kenner.
9 We are seeking guidance from the Court on -- you know,
10 under the law --

11 THE COURT: Right.

12 MS. KOMATIREDDY: -- as we've noted, and in our
13 sentencing memorandum, the Court can take -- can simply
14 take the affidavits of loss on their face, or the Court
15 can entertain challenges to them, and litigation over
16 them, and we're seeking guidance from the Court
17 (indiscernible) later -- I mean, if I could take the
18 affidavits of loss on their face, in which case we will
19 provide the revised chart and it would include those
20 numbers, or whether -- you know, I imagine Mr. Kenner
21 would want to challenge some of those numbers, whether we
22 could speak -- have a proceeding in that respect.

23 THE COURT: All right. Well, why don't I have
24 Mr. Kenner and Mr. Talkin, this goes to Mr. Constantine
25 as well, to get a chance to review those affidavits, and

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1 if you want to respond to them, I think that's the first
2 step.

3 All right, Mr. Kenner, I don't know - you
4 probably haven't seen those, those just came in. Do you
5 know what I'm referring to Mr. Kenner?

6 DEFENDANT KENNER: I do not, your Honor.

7 THE COURT: I don't have the names of who
8 submitted them, but there was four or five affidavits of
9 loss that came in.

10 MR. BRISSENDEN: Your Honor, I spoke to (audio
11 interference) and he's indicated that (audio
12 interference) is mailing out a copy. I'm separately
13 mailing out a copy today, so hopefully Mr. Kenner should
14 have one --

15 THE COURT: Okay.

16 MR. BRISSENDEN: -- in prison.

17 THE COURT: All right. As I said, we have some
18 time on the restitution issues. So I'll just wait for
19 Mr. Kenner's response on that.

20 DEFENDANT KENNER: All right, your Honor.

21 THE COURT: All right. Any other issues anyone
22 wants to raise with the Court today?

23 MR. TALKIN: No, not from Constantine. Thank
24 you, your Honor.

25 THE COURT: All right, Mr. Kenner?

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1 DEFENDANT KENNER: No, your Honor.

2 THE COURT: All right. The government?

3 MS. KOMATIREDDY: Not from the government, your
4 Honor.

5 THE COURT: All right. Thank you everybody.
6 Take care.

7 IN UNISON: Thank you.

8 (Matter Concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 10th day of July, 2020.


Linda Ferrara

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